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No. 76-519

In the Supreme Court of the United States

OCTOBER TERM, 1976

VICTOR IADAROLA, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The order of the court of appeals (Pet. App. A) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on September 15, 1976. The petition for a writ of certiorari was filed on October 14, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether there was sufficient independent evidence of each petitioner's participation in the conspiracy to permit the admission against him of the statements of a co-conspirator made in furtherance of the conspiracy.

2. Whether the evidence was sufficient to support the convictions.

3. Whether the cumulative impact of three alleged errors denied petitioners a fair trial.

4. Whether evidence seized from the drawer of a dresser on which petitioner Grace Iadarola was sitting at the time of her arrest should have been suppressed.

STATEMENT

Following a jury trial in the United States District Court for the Southern District of New York, petitioners were convicted on three counts charging conspiracy and substantive offenses relating to their possession and sale of counterfeit United States treasury bills, in violation of 18 U.S.C. 371, 472, 473, and 2.[1] Each was sentenced to a concurrent term of five years' imprisonment on each count, execution of which was suspended in favor of five years' probation, and each was also fined $1,000. The court of appeals affirmed without opinion (Pet. App. A).

The evidence at trial showed that on March 27, 1975, Lewis Rubin met with Chester Gray, a government informant, and offered to sell him $2 million worth of government securities, which allegedly were to be stolen from a Federal Reserve Bank, for 50 percent of their value. Gray responded that he did not have the money necessary for the deal but might be able to find a buyer for Rubin. Gray then reported the offer to Agent Paul Sweeney of the Secret Service, who agreed to pose as the buyer. Later that day, Gray spoke with Rubin by telephone and, with Agent Sweeney listening, told Rubin

[1]Co-defendant Lewis Rubin pleaded guilty to conspiracy and one substantive count of selling two counterfeit United States treasury bills.

that he had found a buyer for the securities. They arranged a meeting at which the sale was to be consummated. (Tr. 38-45, 60, 234-237).

On March 31, Gray and Agent Sweeney met Rubin at the Waldorf Astoria Hotel in New York City. During the negotiations, Rubin insisted that he see the money Agent Sweeney had brought to pay for the securities. After Rubin was shown $50,000 in cash, he excused himself to telephone "his people" and then returned and told the other men that the securities would be delivered to the hotel in an hour. When more than an hour had elapsed, Gray went to Room 810, Rubin's room at the hotel, and inquired about the delay. In response, Rubin made a telephone call and asked to speak to "Grace," "Benny," or "Victor." After a brief pause, Rubin hung up the telephone and assured Gray that the securities were on their way. Gray then left to relay this message to Agent Sweeney (Tr. 45-46, 50-52, 211-212, 218-223).

Shortly thereafter, Rubin brought a counterfeit $100,000 treasury bill to the hotel room rented by Agent Sweeney, telling Gray and the agent that he only had two such bills but that the rest would be forthcoming within the next few days.[2] When Agent Sweeney asked to see the second bill, Rubin agreed to return to his room and to retrieve it from "his people." As he left, Rubin was arrested by Secret Service agents, who removed the counterfeit treasury bill and a key to Room 810 from him (Tr. 53, 224-228, 230-231, 394-395). The agents then proceeded to Room 810 and arrested petitioners, its three occupants. Although each petitioner denied knowing Rubin, petitioner Victor Iadarola's wallet contained a paper with the

[2]Petitioners stipulated that the treasury bills were counterfeit (Tr. 765-768).

name "Lous Rubin" and some numbers printed on it and a blank check endorsed by "Lew Marcus," Rubin's alias. In addition, Rubin's attache case, found lying on the bed, contained the names and addresses of petitioners Victor and Grace Iadarola. Finally, when the agents directed petitioner Grace Iadarola to get off the bed, she bypassed three vacant chairs and sat on the dresser in the room. A search of the dresser a few minutes later produced the second counterfeit bill. The following day petitioner Grace Iadarola acknowledged that she knew Rubin, saying that he owed her money, which she had come to the hotel to collect (Tr. 427, 465-472, 474-478, 621-630, 714; Govt. Exs. 4, 5, 8).

ARGUMENT

1. Petitioners contend (Pet. 12-21) that Rubin's hearsay statements to Agent Sweeney and Gray should not have been admitted because there was insufficient independent evidence adduced to establish their participation in a conspiracy with Rubin. This claim was rejected by both lower courts, and their essentially factual determination does not warrant further review. See *Berenyi* v. *Immigration Director*, 385 U.S. 630, 635; *Graver Mfg. Co.* v. *Linde Co.*, 336 U.S. 271, 275.

In any event, the non-hearsay evidence was sufficient to show that petitioners had conspired with Rubin.[3] The proof indicated that Rubin did not have the treasury bills when he first spoke with Agent Sweeney and Gray at the hotel on March 31 and that no one else was present in Room 810 when Gray met there with Rubin

[3]Independent evidence of a conspiracy may be entirely circumstantial. *Park* v. *Huff*, 506 F. 2d 849 (C.A. 5), certiorari denied, 423 U.S. 824; *United States* v. *Cirillo*, 499 F. 2d 872 (C.A. 2), certiorari denied, 419 U.S. 1056.

later that afternoon. Not until the time of petitioners' arrival at the hotel did Rubin appear in Agent Sweeney's room with one of the counterfeit treasury bills. In addition, petitioners were connected to the conspiracy by the presence of the other counterfeit bill in the room in which they were arrested and by Rubin's telephone call to "Victor," "Grace," and "Benny" in an effort to expedite the illegal sale.[4] Finally, petitioners' involvement was further demonstrated by the presence of their names in Rubin's attache case and by their several false exculpatory statements after their arrest.

2. Equally without merit is petitioners' claim (Pet. 22-25) that the evidence at trial was insufficient to support the jury's verdict.[5] In addition to the independent evidence noted above and the testimony of Agent Sweeney and Gray about their dealings with Rubin, the proof showed that, at every step of the transaction, Rubin acted only after conferring with "his people." The chronology of events on March 31, together with petitioners' presence in Room 810 at the moment that Rubin was proceeding to that room to obtain the other counterfeit bill, leads inescapably to the conclusion that petitioners were Rubin's confederates in the illegal scheme.

[4]Rubin's statements constituted a verbal act, not admitted to prove the truth of the matter asserted, and, hence, were not hearsay. *United States* v. *Demopoulos*, 506 F. 2d 1171 (C.A. 7), certiorari denied, 420 U.S. 991; *United States* v. *Burke*, 495 F. 2d 1226 (C.A. 5), certiorari denied, 419 U.S. 1079; *United States* v. *Nuccio*, 373 F. 2d 168, 170-171 (C.A. 2), certiorari denied, 387 U.S. 906.

[5]Although petitioners rely upon remarks by the trial judge that reflected doubts about the credibility of certain witnesses, the court correctly stated that credibility was an issue for the jury to determine and that its own views did not render the evidence insufficient (Tr. 812). See *Hoffa* v. *United States*, 385 U.S. 293, 311. Indeed, at the time of sentencing the court remarked that "I feel that the verdict is a sound one" (Tr. 938).

3. Petitioners contend (Pet. 26-28) that the cumulative impact of three alleged errors denied them a fair trial.

a. Petitioners first argue that a portion of Agent Sweeney's testimony was inadmissible double hearsay. At trial, Gray testified to several conversations that he had had with Rubin on the day of the attempted sale of the counterfeit treasury bills. On cross-examination, petitioners attempted to show that Gray's testimony was recently fabricated (Tr. 61-188). To rebut this accusation, Agent Sweeney testified that Gray had contemporaneously told him about his conversations with Rubin on March 31, including the statement that Rubin had said "Grace was in motion" (Tr. 223). See Fed. R. Evid. 801(d)(1)(B). Although petitioners claim that this testimony went beyond Gray's remarks about his conversations with Rubin, they did not make this objection explicit at trial (Tr. 222-223). In any event, this portion of Agent Sweeney's testimony added little to the government's case against petitioners. Gray had already testified that Rubin had telephoned someone to learn the reason for the delay, had asked for "Grace," and had then stated that "[t]he bonds will be here shortly" (Tr. 51). Petitioner Grace Iadarola and the counterfeit bills both arrived soon thereafter. Thus, the challenged statement of Agent Sweeney was merely cumulative of this evidence.

b. On cross-examination of Agents Sweeney and John Verzeris, petitioners repeatedly suggested that the agents' prior grand jury testimony and reports were inconsistent with their trial testimony and that the agents had fabricated parts of their trial testimony to strengthen the government's case (Tr. 346-347, 661-662, 667-668, 670-672). In addition, petitioners read selected excerpts of the agents' prior statements to the jury to buttress their claim of inconsistency. In response, the Assistant United States Attorney sought to introduce the

agents' grand jury minutes and reports under the doctrine of completeness (Fed. R. Evid. 106) or as prior consistent statements rebutting a charge of recent fabrication (Fed. R. Evid. 801(d)(1)(B)). Although the district court refused to admit this evidence, petitioners nonetheless allege that they were prejudiced by the government's "tactic * * * designed to convey the impression to the jury that these documents contained material favorable to [its] cause * * *" (Pet. 27). This claim is insubstantial, since the government properly sought to have the documents admitted to contradict petitioners' baseless assertion that the agents had altered their testimony at trial. Moreover, petitioners have offered no persuasive reason to believe that the incident prejudiced the jury.

c. Finally, petitioners argue that the district court erroneously allowed the jury to consider the issue of false exculpatory statements after having found "as a matter of law" that petitioners Grace and Benito Iadarola had made no such statements. Contrary to petitioners' contentions, however, the trial judge did not conclude that the statements could not be found to be false; rather, he clearly ruled that the truth of these statements, along with the rest of the evidence, was for the jury to determine (Tr. 816). Although the judge interpreted the evidence concerning the false statements in a manner favorable to petitioners in ruling on their motions for a judgment of acquittal at the close of the government's case (Tr. 801-802), he never intimated that he intended to usurp the province of the jury in the ultimate resolution of this issue.

4. Petitioners contend (Pet. 29) that the district court erred in refusing to suppress the counterfeit treasury bill found in the dresser drawer on which petitioner Grace Iadarola had voluntarily sat at the time of her arrest. Even assuming that petitioners have standing to

challenge the search of a dresser in a hotel room rented by Rubin,[6] the search and seizure here were proper as incident to a lawful arrest. See *Chimel* v. *California*, 395 U.S. 752, 763. As the district court found, the drawer "was within easy reaching distance of any of these [petitioners]" (S. Tr. 6).[7] Moreover, the agents had reason to believe that a counterfeit treasury bill, an easily destroyed or concealed item, was somewhere in the hotel room. Petitioner Grace Iadarola was not searched immediately upon her arrest because no matron was available, and her suspicious actions in bypassing three empty chairs to sit on the dresser, which she appeared to be protecting, drew the agents' attention to that piece of furniture. The search that followed, within minutes of petitioner's leaving the dresser and approximately fifteen minutes after the agents first entered the hotel room, was sufficiently contemporaneous to the arrest to qualify as incident thereto. *United States* v. *Battle*, 510 F. 2d 776 (C.A.D.C.); *United States* v. *Maslanka*, 501 F. 2d 208, 214 (C.A. 5), certiorari denied *sub nom. Knight* v. *United States*, 421 U.S. 912; *United States* v. *Nevarez-Alcantar*, 495 F. 2d 678, 682 (C.A. 10), certiorari denied, 419 U.S. 878.

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[6]See *Brown* v. *United States*, 411 U.S. 223.

[7]"S. Tr." refers to the transcript of the suppression hearing held on February 19, 1976.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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